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INTRODUCTION TO ROBERT A. PASCAL'S MEMORANDUM: THE CODE AS A TEXTBOOK AND A RULE BOOK

Olivier Moréteau*

In 1978, Professor Alain Levasseur asked Professor Robert A. Pascal, then his colleague on the Louisiana State University (LSU) law faculty, to express in writing his thoughts regarding the organization of the Louisiana Civil Code and the explanatory material that appears in it. Pascal produced a short Memorandum that we publish today as a rediscovered treasure. This Memorandum was written two years before Pascal's retirement. It was shared with Dr. Agustín Parise during his time at LSU, and we are grateful to both Levasseur and Parise for offering it for publication.

Robert A. Pascal studied law at the Loyola University College of Law in New Orleans and served during the summer 1938 as a Research Assistant at LSU. A graduate from Jesuit High School in New Orleans, he received a liberal education at Loyola. In law school, the study of the Louisiana civil law became a passion. He published his first article in 1938, in the first issue of the Louisiana Law Review,¹ and his *Recollections of a Life Studying and Teaching Law* came out 72 years later.²

He first collaborated with the Louisiana State Law Institute (LSLI) on its creation in 1938, working on the Compiled Edition of the Louisiana Civil Codes. He later became a consultant on trust law revision, an area of jurisprudence where his thoughts are at the forefront. He also taught and produced significant work on conflict of

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1. Robert A. Pascal, Comment, *Duration and Revocability of an Offer*, 1 LA. L. REV. 182 (1938).

2. ROBERT A. PASCAL: A PRIEST OF RIGHT ORDER 25-95 (Olivier Moréteau ed., 2018).

laws, family law, matrimonial regimes, civil and Anglo-American legal science, and philosophy of law.

In 1940, he was the first person ever to be awarded a Master's degree in Civil Law at LSU. He practiced law in New Orleans for one year, and in 1942, added an LL.M. from the University of Michigan Law School. After serving as a Coast Guard District Legal Officer during World War II, he joined the LSU law faculty. In spring 1951, he taught trust law at the University of Chicago. In 1951–1952 and in 1963–1964, he was a Fulbright lecturer and taught U.S. private law and comparative law at the University of Rome, in Italian. In 1955, he was made full professor at LSU and never left the Law School even after his retirement in 1980, keeping an office as a Professor Emeritus. Many remember his tournament with Tulane Professor Rodolfo Batiza, Pascal insisting that the ancestor of the Louisiana Civil Code (the Digest of 1808) was Spanish in substance and French in form—a “Spanish girl in French dress,” as he later commented.³

Pascal died in 2018, at the age of 102. He marked generations of students and colleagues and is remembered as a man of faith and uncompromising views. Whether or not one embraces his vision of the law as legal order, of mankind as a community of men under God, with the ontological obligation to respect and cooperate with one another, whether or not one endorses his strong preference for the civil law and its codification, he left an important legacy at LSU, in Louisiana, and in worldwide jurisprudence and civil law scholarship.

The Memorandum paved the way to Pascal's Tucker Lecture given at LSU twenty years later and published in the Louisiana Law Review.⁴ It is a pure sample of both the thinking and writing of Robert A. Pascal. I have published a selection of his articles in a volume

3. Robert Anthony Pascal, *Of the Civil Code and Us*, 59 LA. L. REV. 301 (1998).

4. *Id.*

titled *Robert Anthony Pascal, A Priest of Right Order*.⁵ Had I known of the present Memorandum, I would have invited Pascal to include it in the volume.⁶ He might have objected that, as the Memorandum goes saying, it was written without revision and editing, using the French word *impromptu*. Yet it is pure Pascal in the sense that it is crisp and to the point, with no word to be removed without a loss of meaning.

The Memorandum, though very short, speaks volumes of what the experience of the codification of the civil law in Louisiana is, in a state otherwise controlled by the common law and dominated by the United States culture. The section discussing the tripartite organization of the Code, which follows the model of the Institutes by Gaius and the French Civil Code, is remarkable in the sense that it gives a 20th or 21st century rationale to a structure that was adopted by pure convenience. Pascal explains that Part I (Of Persons) and Part II (Things and the Different Modifications of Ownership) provide the core of *imperative* law, whereas Book III (Of the Different Modes of Acquiring the Ownership of Things) is more *suppletive* in content, though not devoid of public order limitations. Pascal admits, however, that Book III could be better organized, but makes limited suggestions to this effect. In his Tucker Lecture, he disapproved of the 1991 addition of a Book IV to the Code (Conflict of Laws),⁷ which this volume of the Journal of Civil Law Studies publishes for the first time in a trilingual version.⁸ His structural analysis of the Code is uncommon in the literature and was further elaborated on in his Tucker Lecture.⁹

5. PASCAL, *supra* note 2.

6. I had asked him to do the first selection and we discussed the arrangement of chapters.

7. Pascal, *supra* note 3, at 303. Pascal taught Conflict of Laws during many years and was of the opinion that that branch of the law does not belong in the Civil Code.

8. Olivier Moréteau & Mariano Vitetta, *Trilingual Louisiana Civil Code, Book IV: Conflict of Laws in English, French, and Spanish*, 13 J. CIV. L. STUD. 351 (2020).

9. Pascal, *supra* note 3, at 304-305.

This first section also expresses a call for prudence regarding code reform. A reason why Pascal worried about law reform connects to the fact that the legislative system of the State of Louisiana makes it easy for individual legislators to introduce a bill and have it discussed and adopted without much discipline and quality control. Though the LSLI prepares the Code revision and other significant legislation,¹⁰ it is an outside agency that does not control the work of the Legislature. Many a private bill introduced is the outcome of active lobbying and coincides “with clients’ and constituents’ vested interests and other desires”¹¹ rather than a shared sense of the public good, which permeated Pascal’s teaching and scholarship. Pascal also complained about the work of the LSLI, where lawyers are overrepresented, which is also conducive of the risk mentioned above. He wished that the Council of the LSLI would be open to a larger cross-section of society.¹²

Part II and III of the Memorandum discuss the presence of explanatory material in the Code, a point of great interest for the contemporary reader. According to Pascal, the view that “rules alone belong to legislation and that the reason for the rules belong to doctrine” (he refers to Portalis) may be suitable “for a people with a *tradition* in which doctrinal opinion has been and is recognized as the law behind the law.”¹³ By contrast, in Louisiana, the judiciary is very strong due to common law influence and local doctrine is weaker than in Europe and is a more recent development. Pascal writes that “the Code must be, more than it ever was before, a *text-book as well as a rule book*.”¹⁴ The French encyclopedia influence

10. Created by La. Act 166 of 1938; see William E. Crawford, *The Louisiana State Law Institute—History and Progress*, 45 LA. L. REV. 1077 (1985); William E. Crawford & Cordell H. Haymon, *Louisiana State Law Institute Recognizes 70-Year Milestone: Origin, History and Accomplishments*, 56 LA. B.J. 85 (2008).

11. Memorandum, Section I.

12. Pascal, *supra* note 3, at 323: “the governing council [of the LSLI] should be re-composed to include educated nonlawyers: philosophers, theologians, social workers, economists, educators and ordinary people.”

13. Memorandum, Section II.

14. *Id.*

on the drafting of earlier versions of the Louisiana Civil Code was recently exposed in this Journal,¹⁵ and Pascal advocates for more explanatory articles, due to the lack of “respect for learning in law”¹⁶ in Louisiana.

The third and final section of the Memorandum that Pascal calls a *lagniappe*¹⁷ denounces the current practice of publishing comments together with the text of revised or new Code articles: “frequently they tie the law to previous law or jurisprudence, and provide a million pegs for false argument.”¹⁸ He also regrets the existence of titles in front of every article, which are not part of the law.¹⁹ Comments and article titles are distractors that interrupt the flow of the reading and make each code article look like an isolated statute, departing from the logic of a code that should be regarded as a whole.²⁰

The Memorandum is pessimistic, as Pascal was not convinced that the State of Louisiana had sufficient resources to make sound code reform, in which case he advocates abstention rather than revision. He, however, projects the optimistic vision that “the ambition in Louisiana should be to have a good workable Civil Code, in content and in form.”²¹ This remark alone makes the Memorandum treasurable.

15. Seth S. Brostoff, *The Encyclopedist Code: Ancien Droit Legal Encyclopedias and Their Verbatim Influence on the Louisiana Digest of 1808*, 13 J. CIV. L. STUD. 33 (2020).

16. Memorandum, Section II.

17. DICTIONARY OF LOUISIANA FRENCH, AS SPOKEN IN CAJUN, CREOLE, AND AMERICAN INDIAN COMMUNITIES, at *Lagniappe*, meaning 2: “A little something extra received for free.” (Albert Valdman & Kevin J. Rottet ed., 2009).

18. Memorandum, Section III.

19. La. Rev. Stat. Ann. § 1:13 9 (A) Headings to sections, source notes, and cross references are given for the purpose of convenient reference and do not constitute part of the law. (B) The keyword, one-liner, summary and adjoining information, abstract, digest, and other words and phrases not contained in the section or sections of the bill following the enacting clause do not constitute part of the law. (Amended by Acts 2006, No. 826, §1.)

20. The author of this introduction follows Pascal's recommendations in publishing the Louisiana Civil Code in English, French and soon Spanish without article titles and revision comments: see Center of Civil Law Studies, *Louisiana Civil Code Online*, LSU Law, <https://perma.cc/9VAP-DC4R>.

21. Memorandum, Section III.

**A MEMORANDUM ON THE ORGANIZATION OF THE
CIVIL CODE AND EXPLANATORY MATERIAL**

February 7, 1978

MEMORANDUM

FROM: Professor Robert A. Pascal

TO: Professor Alain Levasseur

SUBJECTS: I. Organization of the Civil Code
II. Explanatory Material in the Civil Code
III. Comments and Article Titles

The remarks that appear under the first two headings are made at your request. Those that appear under the third are *lagniappe*, but I consider them equally important. Please understand that I am writing without revision or editing, and *impromptu*. You may, nevertheless, use these remarks, with acknowledgment, as you see fit.

I. ORGANIZATION OF THE CIVIL CODE

I recommend retention of the tripartite division of the Civil Code into *books* on Persons, Things, and Acquisition [and Loss] of [Rights and Obligations as to] Things.

The first reason, though not the most weighty, is that the Louisiana bench, bar, and legislature are not so knowledgeable in law as to be able to accept more than minor changes in the traditional structure. Changes there may be, but they must not appear to be radical in form. Indeed, I believe them more ready to accept drastic changes in substance (especially where they coincide with clients' and constituents' vested interests or other desires) than they are to accept changes in appearances or form.

More important to me is that the tripartite division does correspond to and give evidence of certain facts of our legal science and of our extra-legal criteria for the civil law portion of our legal order.

Book I is concerned with Persons, the *subjects* of the law and the non-patrimonial rights and obligations between them. Book II treats of the interests persons may have in Things (including credits), the *objects* of the law; and Book III deals with *the manner in which patrimonial rights and obligations arise and terminate*. If the next Civil Code's form does not itself evidence this analysis, Louisianians will never notice it, and if doctrinaires attempt to teach it, they will ignore it. As I will observe in more detail hereafter, the Louisiana Civil Code must *explain itself* as much as possible. It must teach the law's science and philosophy as well as expound the legal rules. A functional organization (e.g., in terms of a number of *titles* on different subjects) would, I believe, lead to our people desiring to make each title complete in itself and make improbable the economical statement of the *civil law* in terms of principles and general rules applicable to many areas of the law.

Books I and II, I may observe, provide the core of *imperative* law; Book III, on the other hand, represents primarily the area of *suppletive* law. Stated in another fashion, Books I and II declare matters of *public order* character; Book III, on the other hand, is concerned largely with the civil law of *private order* character, the rights and obligations that can be contracted and those that, though not contracted (e.g., delictual obligations) can be the object of compromise. There are exceptions to this primary notion of Book III throughout its length, to be certain, but they are incidental to the main theme. Thus, though succession is primarily testamentary, there are *public order limitations* (e.g., on donations to the prejudice of forced heirs or in favor of others, such as those to certain illegitimates and concubines, where the effect might be family discord or the revelation of scandal; on restrictions in marriage contracts for good domestic peace and order; on certain forms required for certainty as to the intent of the actor; on occupancy and acquisitive

prescription; on liberative prescription; and on the ranking of credits in the event of insufficiency of assets). But all these public order limitations belong in Book III because Book III is concerned with the acquisition and loss of patrimonial rights.

In similar fashion, Books I and II contain some matters that *appear* to be in the *private order* sphere. But here again the appearance is deceptive, for *public order* is at the root. Thus persons must consent freely to marriage, but may not vary the personal relationship of matrimony. (Note that the matrimonial regime, the object of the marriage contract as to patrimonial affairs is in Book III.) Parents may name tutors to their children, but are not at liberty to vary the powers and duties of the tutor. The parental right of enjoyment and that of administering the minor's patrimony are only incidentally patrimonial rights and more directly personal rights growing out of the natural interdependence of family members that the Code respects. Servitudes can arise on convention, but the essential nature of a servitude cannot be changed. The Code defines the limits of status rights and obligations and provides the bounds of rights in things.

It is true that Book III itself could be refined in its arrangement. Indeed, perhaps Articles 1760 and 2292, which tell us so eloquently that there are two sources of [rights and] obligations—*conventions*, or more broadly, voluntary juridical acts, and *the law*—could be placed at the head of the Book, or better yet, moved to the Preliminary Title so that it might be seen that the sources of right and obligation are three: convention, custom, and law, the first being *limited only* and then only as public order demands it, and the last encompassing such laws as those on status relationships, permissible kinds of interests in things, patrimonial situations demanding adjustments (e.g., enrichment without cause), unsolicited acts of cooperation (*negotiorum gestio*), and wrongful acts causing damage or injury.

Certainly it would be well to set out rules applicable to all obligations; state clearly the general rules on the sources of obligations that have in common the act of man (convention unilateral will,

cooperative act, wrongful act); collect together the institutions on the discharge of obligations; and separate out the rules of (1) transfer of things, (2) their original acquisition, and (3) their acquisition by prescription. But I would keep all this in Book III.

II. EXPLANATORY MATERIAL IN THE CIVIL CODE

Even Portalis, I believe, said that rules alone belong in legislation and that the reasons for the rules belong to doctrine. This may be very well indeed for a people with a *tradition* in which doctrinal opinion has been and is recognized as the law behind the law. Anglo-Americans do not have this, have not had it since the Tudors, and in this century have sought to avoid it—as witnessed by realism first, then policy science, and the otherwise inarticulated cult of “advocacy” as characterized by the Code of Professional Responsibility. Our Louisiana lawyers and judges are infected with the disease, as the case of Justice Tate so well demonstrates. If the rules of law are to be made less avoidable, therefore, the reason for their being must be in texts enacted as law. The Code must be, more than it ever was before, *a textbook as well as a rule book*. Without this characteristic of the Codes of 1825 and 1870, the civil law in Louisiana would have been more perverted than it is now. My regret is that these Codes did not go far enough.

Think of the advantage of articles explaining why alimony rules must be considered rules of public order; why the differentiation of the rights of legitimates and ordinary illegitimates and incestuous and adulterous illegitimates must be made so as to maintain peace in families, avoid destructive partitions of family homes and enterprises, and avoid scandal; why the patrimonial affairs of a family should be under one management; why no person should be allowed to interdict another through limitations on a transfer to him; why prescription must not be waived in advance; or why the will of one who has alienated a thing should not have the power to control its use and disposition.

It should be recognized that those of us who know better must protect the people against even so-called law professors who know no more than what judges tell them, or, for one reason or another, seek to communicate no more to their students. If the *raison d'être* of the law is in the legislation, it will not be avoided so easily. Louisiana's situation is not that of a civilian jurisdiction with a respect for learning in law and this must not be forgotten.

III. COMMENTS AND ARTICLE TITLES

In my judgment, there must be no publication whatsoever of what the drafters of articles or the legislators themselves conceived the meaning of the articles to be. Comments theoretically are not law, but they are in fact embellishments that swell the bulk of the verbiage that must be consulted for drafters' or legislators' intent, frequently they tie the law to previous law or jurisprudence, and provide a million pegs for false argument. If something must be said to explain a law, the law is not stated clearly. If Louisiana does not have a people competent enough to write legislation, then a Code revision project must not be entertained.

Comments, besides, break the practical continuity of a Code. The reader no longer reads the articles as convenient segments of a larger exposition of the plan of order for the subject at hand, but rather as isolated statutes. The same observation applies to *article titles*, though to a lesser degree. In my judgement, within any *chapter* or similar division of the Code, nothing should interfere with the *reading* of the chapter as a whole, and nothing should so direct the reader's attention to one or a few particularly relevant provisions. The Code must be written so that the reader will be *forced* to read all the articles on the topic to make certain he has read all he should.

May you see the light. The ambition in Louisiana should be to have a good workable Civil Code, in content and in form. We must not innovate simply to show that we can, or to imitate others whose juristic backgrounds and habits are different from ours. We must

seek an instrument with content and form that will improve our civil order and facilitate its appreciation and its application.